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IN THE

Supreme Court of the United States

October Term, 1968

No. 741

FRED O. DICKINSON, JR., Comptroller of the State of Florida,

Appellant,

v.

THE FIRST NATIONAL BANK OF HOMESTEAD, Homestead, Florida,
and
OKALOOSA NATIONAL BANK, Niceville, Florida,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA,
TALLAHASSEE DIVISION

BRIEF *AMICUS CURIAE* ON BEHALF OF THE STATE OF NEW YORK IN SUPPORT OF PETITION FOR REHEARING

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BRIEF *AMICUS CURIAE* ON BEHALF OF THE STATE OF NEW YORK IN SUPPORT OF PETITION FOR REHEARING

Statement

This brief is submitted on behalf of the State of New York in support of appellant's petition for rehearing of the captioned case or, in the alternative, for a remand to the Court below for reconsideration. The interests of the State of New York and all other States similarly situated

with respect to the taxes involved are adversely jeopardized by the decision herein upon the substantial revenues derived from such taxes. As to New York State, the revenue derived from its sales and use taxes (Tax Law, Art. 28, 59 McKinney's Consolidated Laws of New York, §§ 1101, *et seq.*), as well as from its recording mortgage tax (Tax Law, Art. 28, *ibid.*, §§ 250, *et seq.*), run into several millions of dollars annually which are collected from both State and national bank transactions which are presently and statutorily subject to both tax impositions.

Question Presented

Whether the States have the constitutional power under the Tenth Amendment to the Constitution of the United States to impose State and local sales and use taxes upon private retail sales transactions entered into by national banks, or possess the power to impose documentary stamp taxes upon private transactions when such banks, as they function today as *private business corporations,* are no longer Federal instrumentalities so as to be entitled to either implied constitutional or statutory immunity.

The Tenth Amendment provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the State, are reserved to the States respectively, or to the people."

ARGUMENT

The Supreme Court decision in the *First Agricultural Bank* case is not dispositive of the issues, since this Court did not consider the Tenth Amendment and national banks, as they function today, are not Federal instrumentalities and Congress has no constitutional authority by virtue of the Tenth Amendment to immunize them by § 548 of the National Banking Act.

The decision in *First Agricultural Bank* is completely distinguishable.

This Court's decision in *First Agricultural National Bank* v. *Tax Commission,* 392 U. S. 339 (1968) does not dispose of the present constitutional questions arising under the Tenth Amendment to the Federal Constitution as to the sovereign taxing powers of the States thereunder. This question is so real and substantial as to warrant a full rehearing thereon in order to resolve "basic constitutional issues of the utmost concern"* (*cf., e. g., Reid* v. *Covert,* 354 U. S. [1956] where rehearing was granted following decision on the merits).

The opinion of the majority (BLACK, J.) in the *First Agricultural Bank* case, *supra,* discloses that this Court decided that case upon non-constitutional ground, as follows (*ibid.,* p. 341):

> "Because of pertinent congressional legislation in the banking field, we find it *unnecessary to reach the constitutional question* of whether today national banks should be considered nontaxable as *federal instrumentalities.*" (Emphasis added.)

---

* Indeed, in the area of constitutional immunity, this Court has said "that the duty rests in this Court to decide for itself facts or constructions upon which federal constitutional issues rest." (*Kern-Limerick, Inc.* v. *Scurlock,* 347 U. S. 110, 121 [1953].)

This appears to be the result of the Court's custom in the field of constitutional immunity to resolve disputes upon the basis of statutory construction by avoiding constitutional issues where it is assumed that the statute should govern (12 U. S. C. A. § 548; see, *e. g., Carson* v. *Roane-Anderson Co.,* 342 U. S. 232, 236 [1951]; *Federal Land Bank* v. *Kiowa Co.,* 368 U. S. 146, 156 [1961].) We submit, however, that this Court's construction of § 548, *supra,* is valid *only* if national banks, as they function today, are *true* Federal instrumentalities. If not, they then are merely *private* business corporations as to which the Congress has absolutely no constitutional authority to confer immunity from State taxes, since the constitutional justification for § 548 no longer exists, and Congress cannot divest the States of their sovereign taxing powers under the Tenth Amendment, *supra,* and such amendment is activated so as to permit the imposition of the taxes here involved. This constitutional question was *neither argued, briefed nor passed upon* by this Court either in the instant case or in the *First Agricultural Bank* case, *supra.*

The New York Court of Appeals unanimously held in 1967 in *Liberty National Bank and Trust Company* v. *Buscaglia, et al.,* 21 N. Y. 2d 357 that national banks were not Federal instrumentalities and were entitled to neither constitutional nor statutory immunity. The State of New York opposed Liberty Bank's jurisdictional statement in this Court in a motion to either affirm or dismiss the appeal upon the grounds that the Tenth Amendment to the Federal Constitution was supreme, since Congress had no constitutional authority to immunize national banks from State and local sales taxation if they were no longer Federal instrumentalities entitled to tax immunity. Following this Court's decision in the *First Agricultural Bank case, supra,* Liberty National Bank petitioned the New

York State Court of Appeals for reargument and such reargument was ordered on October 10, 1968 (22 N. Y. 2d 973), following which Liberty National Bank moved this Court to dismiss its appeal upon the ground that there was "no longer a final judgment which can be reviewed by this Court and the appeal docketed on June 10, 1968 is now moot". This Court dismissed the appeal pursuant to Rule 60 on November 1, 1968. Following reargument in the New York Court of Appeals, that Court on February 19, 1969 ruled:

> "Upon reargument:
>
> Order affirmed, without costs, upon the constraint of recent Supreme Court decisions (*Dickinson* v. *First National Bank of Homestead*, ___ U. S. ___, 37 U. S. Law Week 3267, decided January 20, 1969; *First Agricultural Bank of Berkshire County* v. *State Tax Commission*, 393 U. S. 339).
>
> No opinion.
>
> All concur."

The Tenth Amendment yields to the supremacy clause of the Federal Constitution *only* when Federal supremacy exists. However, national banks, as they function today, are not true Federal instrumentalities, as we shall demonstrate. They are merely *private* business corporations to which no constitutional immunity from State taxation can be conferred by Congress (see *e. g., Union Pacific Railroad Co.* v. *Penniston*, 85 U. S. 5 [1873]; *Western Union Tel. Co.* v. *Mass.*, 125 U. S. 530 [1887]; *Reagan* v. *Mercantile Trust Co.*, 154 U. S. 413 [1894]; *Central Pacific Railroad* v. *Calif.*, 162 U. S. 92, 125 [1895]; *Williams* v. *City of Talladega*, 226 N. Y. 404 [1912]; *Alward* v. *Johnson*, 282 U. S. 509 [1930]; *Union Bank and Trust Co.* v. *Phelps*, 288 U. S. 176 [1930]; *Broad River Power Co.* v. *Query*, 288 U. S. 178 [1932]; *Indian Territory Illuminating Oil Co.* v. *Board of*

Equalization, 288 U. S. 325 [1932]; *Susquehanna Co.* v. *Tax Comm.,* 293 U. S. 291 [1930].)

We further submit that this Court should re-examine the 1950 bill to amend § 548, *supra,* which was referred to in the majority opinion in the *First Agricultural Bank* case, *supra.* There it was said (392 U. S. 339, 346):

> "Finally, in 1950 a bill was sent to the Senate Committee on Banking and Currency which expressly permitted the levying of state sales and use taxes on national banks, but Congress did not pass it.[9] [9. See Hearing on S. 2547 before Subcommittee on Federal Reserve Matters of the Senate Committee on Banking and Currency, 81st Cong., 2d Sess., 9 (1950)]."

This quotation seems to have been adopted from a brief reference thereto in the *First Agricultural Bank's* brief (p. 21) which was *neither answered nor objected* to in the answering brief of the Massachusetts Tax Commission. In the light of subsequent Federal legislation, *infra,* sponsored by the Senate Banking Committee in the area of Federal instrumentalities, a full re-evaluation of the subcommittee report should be made because profound objections do exist with respect to Congressional intent. A fair reading of the entire report of the Banking Subcommittee shows no Congressional intent that any permissive legislation was needed in this area. On the contrary, the report clearly shows only that its proponents felt that the proposed Senate bill was *desirable* and that the Federal Government had no objections thereto. (See, also, *Cong. Rec.,* 81st Cong., 2d Sess., p. 17085.) Indeed, the subcommittee chairman himself noted its inconsequential effect by saying that the *McCulloch* case (*McCulloch* v. *Maryland,* 4 Wheat. 316) was one "involving an effort to tax the Bank of the United States by the State of Maryland in such a way that the Bank *could not have successfully operated*"

(emphasis added, *ibid.*, p. 2). It must be pointed out, too, that the Senate Banking and Currency Committee merely reported, in part, to the Senate in its "Summary of Activities" during the 81st Congress on the 1950 bill, Sen. 2457, *supra*, that "The bill was not reported as the session was drawing to a close and full attention of Committee was then focused on Defense Production Act." (*Cong. Rec.*, 81st Cong., 2d Sess., p. 17085.) There is, of course, *not one word* in the subcommittee's report which deals with the present question as to whether national banks are actually Federal instrumentalities. Therefore, since the 1950 bill was never reported out of the Senate Banking Committee for Senate vote and was never introduced in the House of Representatives it should not be construed as evidencing any Congressional intent at all, from which to even infer any judgment on the part of (1) the Senate Banking Committee, (2) the Senate itself or (3) to the House of Representatives. Indeed, subsequent action by the Senate Committee on Banking completely destroys any claim that national banks are Federal instrumentalities. The Senate Committee on Banking and Currency specifically reported in 1961 on those Federal corporations, financial institutions, or agencies of the Federal Government having *statutory tax exempt status*, for example, as follows: Federal Reserve Banks (12 U. S. C. 531), Federal Land Banks (*ibid.*, 931), Federal Farm Mortgage Corporation (*ibid.*, 1020f), Federal Intermediate Credit Bank (*ibid.*, 1111), Central Bank for Cooperatives (*ibid.*, 1138c), Federal Home Loan Bank (*ibid.*, 1433), Federal Savings and Loan Associations (*ibid.*, 1464), Federal National Mortgage Association (*ibid.*, 1716), Federal Savings and Loan Insurance Corporation (*ibid.*, 1725), Federal Housing Debentures (*ibid.*, 1747g), Federal Deposit Insurance Corporation (*ibid.*, 607), Reconstruction Finance Corporation

(*ibid.*, 607), Community Credit Corporation (*ibid.*, 713a-5), Certain Government Securities (31 U. S. C. 868), Public Housing Administration (42 U. S. C. 1405(e)) (see 1961 *U. S. Code Cong. and Admin. News,* Vol. 2, pp. 2006-2007). These named corporations, among others itemized by statute (Government Corporations Control Act [1945, as amended], Title 31, ch. 14, §§ 846 and 847) were either defined by Congress as "wholly owned Government Corporations" (41 such corporations) or as "mixed ownership Government Corporations" (4 such corporations) (*ibid.*, §§846, 847), and were also by the same Act, declared to be "*an agency or instrumentality of the United States*" (*ibid.*, § 869, emphasis added).

National banks, of course, were not included in either category, nor was this legislation ever called to the attention of this Court in the *First Agricultural* case, *supra.*

The legislative history of the Act* clearly disclosed that a "Government Corporation is a constitutional means of carrying into effect legitimate powers of the Federal Government"; that its intent was that "it prohibits the creation of any Government Corporation to act as an *agency* or *instrumentality* of the United States except by or pursuant to action of Congress, and requires those now operating under State charters to institute dissolution or liquidation proceedings on or before June 30, 1948, subject to reincorporation by act of Congress" (emphasis added; see also Title 31, *supra,* § 839); and that "It further provides that no corporation shall be *created, organized* or acquired hereafter by any officer or *agency* or *instrumentality* of the United States, except by act of Congress or pursuant to an

* *Senate Rep.* No. 694, 1945 by Senate Banking and Currency Committee, *U. S. Code Cong. Service,* 79th Cong., 1st Sess., 1945, pp. 888, 890 and 901.

act of Congress specifically authorizing such action" (emphasis added). Again, national banks have not been so designated by any act of Congress. Indeed, the Treasury Department in which the Comptroller of the Currency serves (see *e. g., United States Government Organization Manual*, 1968-69, pp. 97, 107), also ruled in 1963 that national banks are not an "agency or instrumentality of the United States" under the Internal Revenue Code, as follows (Internal Revenue Bulletin, Cum. Bul. 1963-2, p. 585):

> "Section 4384.—Liability for Tax
>
> 26 CFR 47.4384-1: Liability for Tax. Rev. Rul. 63-217
>
> "National Banks frequently are parties to conveyances of realty. Under the provisions of section 4384 of the Internal Revenue Code of 1954, as amended, the United States or any agency or instrumentality thereof shall not be liable for the documentary stamp tax on conveyances of realty, imposed by section 4361 of the Code, with respect to an instrument to which it is a party.
>
> "*Held*, the exemption from liability provided by section 4384 of the Code does not apply to a national bank which is a party to a conveyance of realty, *since such a bank, being a private corporation, is not an 'agency or instrumentality'* of the United States for purposes of that section of the Code." (Emphasis supplied.)

Parenthetically, the mortgage recording tax imposed by New York, for example, is not imposed upon national banks, in any event. Rather, the taxes imposed "on the privilege of recording the mortgage" (Tax Law, § 253, McKinney's Consolidated Laws of New York, Book 59), the constitutionality of which have been sustained and reviewed by this Court upon objections that it was imposed upon an alleged instrumentality of the United States

(*Matter of Silberblatt, Inc.* v. *Tax Commission*, 5 N. Y. 2d 635 [1959] cert. den. 361 U. S. 912). Indeed, this Court invited the Solicitor General of the United States "to file a brief setting forth his views as to the importance to the Federal Government of the issues involved". (361 U. S. 802, 912.) However, he erroneously and unsuccessfully urged (Brief, p. 4):

> "* * * This Court has held in cases involving similar tax statutes that, for Federal purposes, the tax is to be considered a tax upon the mortgage where it falls upon a corporation which is an agent or instrumentality of the United States. *Federal Land Bank* v. *Crosland*, 261 U. S. 374; *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21. The rationale of these decisions would appear to be equally applicable here, since the corporations—although privately organized—are instrumentalities of the Federal Government."

Of course, both the *Federal Land Bank* and *Pittman* cases were distinguishable there, as well as here, because, as the New York Court of Appeals found in the *Silverblatt* case, *supra*, those cases were "inapplicable since they turned on federal statutes which expressly declared the Federal Land Bank and the Home Owners' Loan Corporation to be federal instrumentalities". (5 N. Y. 2d 641.) Moreover, the documentary stamp tax imposed by Florida which is required to be collected and remitted by the appellees is constitutional (see, *e. g.*, *Colorado Bank* v. *Bedford*, 310 U. S. 41 [1939]).

Long before the legislation, just referred to, however, Congress had also denied to national banks all claims to constitutional immunity. The *coup de grâce* concerning national bank immunity occurred in 1935 when the Congress withdrew Congressional authority of national banks to issue national bank notes as part of the nation's currency. This withdrawal by Congress of its constitutional

power to regulate currency to such extent (Const., Art. I, cl. 5; *Amoskeag Savings Bank* v. *Purdy*, 231 U. S. 373 [1913]; *cf. Smith* v. *Davis*, 323 U. S. 111 [1944], a power as supreme as the borrowing power, *Society for Savings* v. *Bowers*, 349 U. S. 143 [1954]; *Free* v. *Bland*, 369 U. S. 663 [1962]), *simultaneously* withdrew from national banks their status as Federal instrumentalities and clearly terminated all need for further protection theretofore secured by constitutional supremacy or by § 548, *supra*, originally enacted pursuant thereto in order to safeguard the currency. Consequently, national banks thereafter ceased to be Federal instrumentalities.

The precise reason for the enactment of the National Bank Act of 1869, as its title specifically states, was to "* * * Provide a National Currency, secured by a Pledge of United States Bonds and to Provide for the Circulation and Redemption Thereof" (13 Stat. 99). This must be compared with the similar title to the Federal Reserve Act (38 Stat. 251) which provided "An Act to provide for the establishment of Federal reserve banks, to furnish an *elastic currency*, * * *", and with the fact that the *nation's currency* since 1935 is issued by the Federal Reserve System as Federal Reserve Notes which "shall be obligations of the United States" (Title 12, U. S. C. A. § 411).

Up to this time (1935) Congress had the right to permit national banks "to facilitate the performance of governmental functions—[and] . . . the right to protect the operations thus validly authorized" (*cf., e. g., Pittman* v. *Home Owners' Corp.*, 308 U. S. 21, 32-33 [1939]; *Federal Land Bank* v. *Kiowa Co.*, 368 U. S. 146, 151 [1961], as corporations which are true Federal instrumentalities, *supra*). But when the governmental function is withdrawn, the protection is likewise withdrawn, since while it may be true

that "when Congress Constitutionally creates* a corporation through which the Federal government lawfully acts, the activities of said corporation are 'governmental'—not proprietary" (*Federal Land Bank* v. *Bismark Co.*, 314 U. S. 95, 102 [1941]; *Federal Land Bank* v. *Kiowa Co.*, 368 U. S. 146, 151 [1961]; see also *Callam County, Washington et al.* v. *United States* and *United States Spruce Production Corp.*, 263 U. S. 341 [1941]; *Pittman* v. *Home Owners' Corp., supra*, 308 U. S. 21 [1939]). Indeed, national banks stand today upon no different tax footing under the governmental immunity doctrine from, for example, those proprietary functions performed by the States which have been held subject to federal taxation for want of implied governmental immunity in the other direction (see *e. g., Helvering* v. *Gerhardt*, 304 U. S. 405 [1938]; *Allen* v. *Board of Regents*, 304 U. S. 439 [1938]; *New York* v. *United States*, 326 U. S. 572 [1945]; *Wilmette Park Dist.* v. *Campbell*, 338 U. S. 41 [1949]; *Parden* v. *Terminal R. Co.*, 377 U. S. 184, 196 [1963]).

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* Here, of course, national banks are not *created* by Congress—they merely came into being of their own volition under permissive legislation (Title 12, U. S. C. A. §§ 21, *et seq.*).

CONCLUSION

The Petition for Rehearing should be granted so that the cause may be heard on its merits or, in the alternative, the decision below should be vacated and the cause remanded for reconsideration.

Dated: February 25, 1969.

Respectfully submitted,

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